89-389

Supreme Court, U.S.
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No._____

IN THE SUPERIOR COURT OF THE U.S.
AUGUST TERM, 1989

FATHER RICHARD McDONNELL,
PETITIONER

V.

EPISCOPAL DIOCESE OF GEORGIA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF GEORGIA

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Questions Presented

1. Does the First Amendment prohibit civil court jurisdiction over religious organizations where the property rights of a clergyman are at issue and extensive inquiry into doctrinal beliefs or practices is not required of the courts?

2. Does "strict deference" by civil courts to the decision of a religious organization to prematurely terminate an employment contract for a term of years of a member of its clergy violate the Establishment Clause of the First Amendment?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Father Richard McDonnell, and the respondent, The Episcopal Diocese of Georgia.

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IN THE SUPREME COURT OF THE UNITED STATES

AUGUST TERM, 1989

Father Richard McDonnell, Petitioner

v.

Episcopal Diocese of Georgia, Respondent

Petition For A Writ of Certiorari to

The Court of Appeals of the State of Georgia

The petitioner, Father Richard McDonnell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Georgia entered in the above entitled proceeding on March 17, 1989.

The Georgia Supreme Court's denial of certiorari is not reported.

The Georgia Court of Appeals slip opinion has not been reported. It is reprinted in the appendix hereto.

The memorandum decision of the Georgia Superior Court is not reported. It is reprinted in the appendix attached hereto.

JURISDICTION

The petitioner prayed for relief pursuant to the common law of contracts in the State of Georgia on June 19, 1987, in the Superior Court of Chatham County, Georgia. On April 13, 1988, the Superior Court granted respondent's motion for summary judgment based on its views of the Canons of the Episcopal Diocese of Georgia.

On March 17, 1989, the Georgia Court of Appeals upheld the grant of summary judgment on different grounds, holding that petitioner's dispute with respondent was an ecclesiastical matter and that therefore the First Amendment

requires that the civil courts of Georgia must give deference to the Diocese's decision to terminate petitioner's employment contract, see the Appendix, infra. The issue of First Amendment protections was not plead by respondent and was raised sua sponte by the Georgia Court of Appeals.

The Georgia Supreme Court denied certiorari on May 4, 1989, and denied the petition for rehearing on May 25, 1989.

The jurisdiction of this Court to review the judgment of the Georgia Court of Appeals is invoked under 28 U.S.C. & 1257.

PROVISIONS OF LAW

First Amendment of the Constitution of the United States.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

Georgia Code Section 13-2-2

Georgia Code Ann. Section 13-2-2. Rules for interpretation of contracts generally.

The following rules, among others, shall be used in arriving at the true interpretation of contracts:

> (4) The construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part.

STATEMENT OF THE CASE

Petitioner was offered and accepted a position with the Respondent on April 13, 1984 as the vicar of the Church of Annunciation in Vidalia, Georgia and to be priest in charge of St. Thomas Aquinas Church in Hazelhurst, Georgia.

Petitioner was provided with a Manual of Diocesan Policies and Practices ("The Manual") at that time, which stated on page 4:

> Diocesan Mission Clergy
>
> When a clergyman accepts the Diocesan's call to fill a mission cure in the diocese, such acceptance constitutes an implied agreement that his tenure will be for a minimum of three years. Resignation prior to three years, unless such termination is by agreement by the bishop and clergyman,

constitutes a breach of contract. (Emphasis theirs).

Petitioner began work for the Respondent on June 1, 1984. On November 22, 1985, he received formal notice that he was being terminated from his position with Respondent. The termination was without Petitioner's consent.

The Respondents assert that the provision set forth in the Manual above is in conflict with the Canons of the Episcopal Church, specifically Title II, Canon 6, Section II which grants the Bishop power to appoint and remove mission clergy. The Canons can be amended only by a vote of the Ruling Convention. The forward to the Manual states that it supplements

policies formally established by Diocesan Canon.

REASONS FOR GRANTING THE WRIT

I

THE GEORGIA COURT OF APPEALS WAS IN ERROR WHEN IT HELD THAT THE FIRST AMENDMENT PROHIBITS CIVIL COURT JURISDICTION OVER RELIGIOUS ORGANIZATIONS WHEN PROPERTY RIGHTS OF A CLERGYMAN ARE AT ISSUE, AND THE DECISION CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS.

At the outset it should be noted that respondent never plead First Amendment issues and, therefore, should be deemed to have waived the First Amendment as a defense.

Secondly, the First Amendment does not prohibit civil court jurisdiction over religious organizations where the property rights of a clergyman are at issue and extensive inquiry into doctrinal beliefs or practices is not required of the courts.

Religious entities such as the Respondent own property, contract for goods and services, and have many of the same powers as a civil corporation. Although shielded to a degree from government action by the First Amendment and its application to the states by the Fourteenth Amendment civil courts do have jurisdiction over disputes involving religious entities if the resolution of that dispute is based

upon the application of neutral principles of law. The application of such neutral principles of law must not result in excessive government entanglement with doctrinal belief or practices. Jones V. Wolf, 443 U.S. 595 (1979); Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

When a religious entity has a dispute over property rights, it is appropriate for a civil court to utilize "neutral principles of law" in analyzing the issue taking into consideration deeds, state statutes, the general church's constitution, and the local church's charter. Jones v. Wolf, supra.

However, the First Amendment prohibit civil courts from resolving

church property disputes on the basis of doctrinal beliefs and practices.

The erroneous position of the Georgia Court of Appeals below is that the decision to terminate petitioner's employment is an ecclesiastical matter not subject to review by the civil courts. The Georgia Appellate Court based its decision on the rationale of the earlier case of Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). In that case the Illinois Supreme Court interfered with the reorganization of one Diocese into three Dioceses and the defrocking of a priest. The Serbian Orthodox Church is a hierarchical church. The reorganization and

defrocking of the priest was decided on by a tribunal, and affected the allocation of power within the church structure. As such it constituted an essentially ecclesiastical matter which should not be probed by civil courts. Serbian Orthodox Diocese v. Milivojevich, supra, at 709.

The Georgia Appellate Court erroneously felt itself to be bound by the decision of Respondent to terminate petitioner based on the following language: "that civil courts are bound to accept the decision of the highest judicatories of a religion's organization of hierarchical polity on matters of discipline, faith, internal organization or ecclesiastical role,

custom or law." Serbian Orthodox Diocese, supra at 713.

There is a direct conflict between the Georgia Appellate Court's view of the proper role of the courts in such matters and that of other state courts. Illinois has affirmed that courts can intervene to protect a clergyman in the enjoyment of his office, if that clergyman's relationship with his church confers property rights and no issues of doctrinal belief are at issue. Lily of the Valley Spiritual Church v. Sims, 523 N.E. 2d 999, 1001 (Ill. App. 1 Dist. 1988), see also Aglikin v. Kovacheff, 516 N.E. 2d 704 (Ill. App. 1987).

This case is further distinguished from Serbian Orthodox

Church, supra, by the fact that petitioner's property rights are affected by the termination of his contract prior to its expiration. The facts as alleged by the petitioner indicate that he had a contract for a term of years and was not an employee at will. This set of circumstances created a property interest in his continued employment.

The neutral principles of law approach can also be applied to the question of cause for termination. Under Georgia law, there is implied in every contract for services a duty to perform with reasonable skill and diligence. Howell v. Ayers, 129 Ga. App. 899, 202 S.E. 2d 189 (1973). There is no evidence in

the record that indicates that the question of the existence of a contract or cause for termination would have involved religious doctrinal beliefs. Also, respondents have never alleged that petitioner was terminated for cause, but that he was an at-will employee. Repondent's also never alleged that they were protected by the First Amendment.

Another distinguishing factor between the instant case and Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) is the internal organization of the church. In Serbian Orthodox Diocese, supra, the Holy Synod and the Holy Assembly of Bishops had designed specific procedures and tribunals for the

resolution of internal disputes.

In the case at hand, the Canons of the Episcopal Diocese do not set up specific internal methods for resolving the dispute, and the Manual invites civil court jurisdiction. The Manual informs clergymen that should they leave their position before the three-year period has expired, that the church will treat it as a breach of contract. Furthermore, respondent chose to treat this case as a contractual issue and not a First Amendment issue.

Although the Georgia courts have consistently found that an employment manual cannot create a contract for a term of years, none of the cases cited by Respondent

addressed a manual which specifically set forth a term of years. See, Nelson v. M & M Products Company, 168 Ga. App. 280 (1983); Swanson v. Lockheed Aircraft Corp., 181 Ga. App. 876 (1987); Miles v. Bibb Co., 177 Ga. App. 364 (1985); Georgia Ports Authority v. Rogers, 173 Ga. App. 538 (1985). The reason that the Georgia Courts relied upon to find no contract in the above cases was the fact that they failed to specify a term of years. Georgia law recognizes that, in the interest of public policy, instruments which purport to establish contractual obligations should be construed so as to uphold these obligations where ambiguities exist. Ga Code Ann. & 13-2-2(4);

Moore v. Hughey, 133 Ga. App. 901, 212 S.E. 2d 503 (1975).

New York has also indicated that if property rights were at stake that civil courts may interfere with a church's affairs. Mays v. Burrell, 508 N.Y.S. 2d 226 (App. Dist. 1986).

The issue in the instant case is distinguishable from those involved in Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), and Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), which was also relied upon by the Georgia Appellate Court. In both of those cases and in Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929), a civil court attempted to impose its decision on

a hierarchical religious entity as to who should control the church, or be a chaplain in a particular church. In this case, petitioner has not demanded that he be reinstated, but rather has asked for damages for breach of contract.

Finally, any analysis of the principles outlined in Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) is modified by this court's decision in Jones v. Wolf, 443 U.S. 595 (1979) which approves of civil court's application of neutral principles of law to church property issues:

> The primary advantages of the neutral principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well

> established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity and practice. Jones v. Wolf, supra, at 603.

Clearly, issues of contract law in this case are no less familiar to the judiciary that trust or property law referenced above; therefore, civil courts should be allowed to construe employment contracts between religious entities and their employees.

II

THE DECISION BY THE GEORGIA COURT OF APPEALS BELOW TO GIVE DEFERENCE TO A RELIGIOUS ENTITY'S INTERPRETATION OF ITS CONTRACTUAL RELATIONS WITH ITS CLERGY RAISES IMPORTANT AND UNRESOLVED ESTABLISHMENT PROBLEMS.

Father McDonnell and other clergy are prevented redress in the courts for contract disputes by the rational of the Georgia Court of Appeals. If Father McDonnell were in another profession he would be allowed to have a court determine whether he was prematurely terminated from a three-year contract, and if so, be awarded damages.

The fact that hierarchical churches do not have to account to the Georgia Civil Courts for their treatment of clergyman employees amounts to an endorsement of hierarchical religions which runs afoul of the Establishment Clause of the First Amendment. Government action or inaction which endorses religion poses an Establishment Problem. Amos v. United States, ___ U.S.___, 107 S.Ct. 2862, 2874 (1987), (Justice O'Conner's concurring opinion).

Under Justice O'Conner's common sense approach, or by the more mechanical approach outlined by this court in Lemon v. Kurtzman, 403 U.S. 602 (1971) "strict deference" as applied by the Georgia Court of

Appeals adversely effects an individual's property rights in favor of those of a religion. No secular purpose can be advanced by allowing religious entities' exemption from standard contract law.

Although the Free Exercise Clause demands that religious entities be given somewhat different treatment by the Government than other organizations receive, at some point accommodation becomes an "unlawful fostering of religion." Hobbie v. Unemployment Appeals Comm'n of Florida, ___ U.S. ___, 107 S.Ct. 1046, 1051 (1987).

In fact, this court has already indicated that a "strict deference" formula could cause excessive

Government entanglement with religion, more so than a neutral-principles approach. A rule of compulsory deference would entail a decision as to which unit of a church government has ultimate control.

> In some cases this task would not be difficult. But in others, the focus of control would be ambiguous, and [a] careful examination of the constitutions of the general and local church, as well as other relevant document [would] be necessary to ascertain the form of governance adopted by the members of the religious association. In such cases the suggested rule would appear to require a searching and therefore impermissible inquiry into church polity ... The neutral principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.

Jones v. Wolf, 443 U.S. 595, 605

(1979). Thus it can be seen that strict deference to the decisions of a hierarchical entity such as respondent, may well involve more entanglement with the religion than the application of the neutral-principles doctrine.

CONCLUSION

The Georgia Court of Appeals erroneously concluded that it could not enforce an employment contract between respondent and its clergyman employee. Application of neutral-principles of contract law would not involve an excessive government entanglement with religion, and would provide resort to the courts for aggrieved clergy and their churches. If Father McDonnell had walked off of the job prior to the expiration of his three-year term, respondent made it fairly clear in the Manual that Father McDonnell would be in breach of contract.

Since Father McDonnell was fired without cause, he should have

the right to hold respondent in breach of contract. To deny him redress simply because he is a member of the clergy is manifestly unfair and endorses the Episcopal Diocese in a manner forbidden by the Establishment Clause. For these reasons the judgment of the Georgia Court of Appeals is in error and should be reversed.

Respectfully submitted,

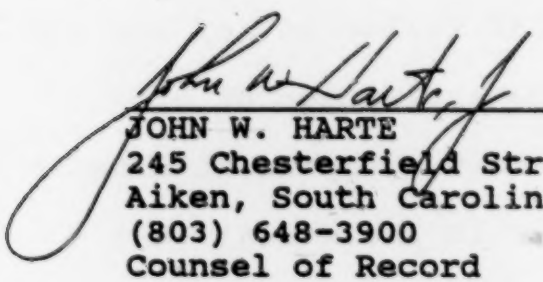

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EXHIBIT A

In the Court of Appeals of Georgia

77181. McDONNELL v. EPISCOPAL DIOCESE OF GEORGIA. (BA-156 to BEA)

BEASLEY, JUDGE

Appellant, Father Richard McDonnell, was selected by the Episcopal Diocese of Georgia to serve as minister for two of its mission churches. After he had served for about one-and-a-half years, he was terminated from that capacity by the diocese against his wishes. He sued to recover damages for breach of an alleged employment contract. The trial court granted summary judgment to the diocese and denied partial summary judgment to

appellant on the issue of the existence of such a contract.

When Father McDonnell accepted the call, the diocese furnished him with a copy of a manual of directives entitled "Diocesan Policies and Practices and Liturgical Customary." He asserts that a binding 3-year contract was created by the following language contained in this document: "DIOCESAN MISSION CLERGY. When a clergyman accepts the Diocesan's call to fill a mission cure in the Diocese, such acceptance constitutes an implied agreement that his tenure will be for a minimum of three years. Resignation prior to three years, unless such termination is by mutual agreement by the Bishop and the clergyman, constitute a breach

of contract."

A provision of the manual dealt with involuntary termination: "INVOLUNTARY TERMINATION. It is recognized that, from time to time, a pastoral situation may occur which might necessitate a priest's removal from his cure. The Diocesan Council has urged the Diocese to offer such a clergyman a reasonable period of transition, during which he may be relieved of all pastoral responsibilities."

Father McDonnell assents that, pursuant to the manual, his termination from this position prior to the expiration of three years was effected without "such cause as would necessitate a priest's removal from his cure under the policies, practices and, or customs of [the

Diocese]."

We hold that summary judgment was mandated, but for a very different reason than stated in the appealed judgment. The trial court was prohibited by the First Amendment, applicable to the courts of Georgia by the Fourteenth Amendment, from exercising judicial authority in this dispute. Serbian Orthodox Diocese v. Milivojevich, 426 U. S. 696 (96 SC 2373, 49 LE2d 151 (1976); Crowder v. Southern Baptist Convention, 828 F2d 718 (11th Cir. 1987); Monahan v. Sims, 163 Ga. App. 354, 359 (2) (294 SE2d 548) (1982).

Neither the defendant nor the court raised this issue below, and it did not arise until oral argument in this court, after which

the parties filed supplemental briefs to discuss it. Even though it was not raised in defendant's motion for summary judgment, the trial court must sua sponte ascertain whether it has jurisdiction, when it appears that it may not. OCGA & 9-12-16; South-Eastern Underwriters Assn. v. Cravey, 216 Ga. 599, 600 (118 SE2d 471) (1961); Baggett Transportation Co. v. Barnes, 108 Ga. App. 68 (132 SE2d 229) (1963). The same threshold inquiry must be made by ours. Barland Co. v. Bartow County Bd. of Tax Assessors, 172 Ga. App. 61, 62 (322 SE2d 316) (194). The civil court cannot take jurisdiction of an ecclesiastical issue even if the parties present it for resolution, because the First

Amendment prohibits such action by the civil judicial system.

The entanglement of civil authority into ecclesiastical affairs which is prohibited by our fundamental law and which was one of the promptings of the creation of this nation is evident in this lawsuit. A priest sues his church, bringing to a civil court a dispute over his termination as vicar of one mission church and priest-in-charge of another. He seeks monetary damages representing lost wages, consequential damages, interest and costs, claiming breach of an alleged civilly enforceable contract governing his call.

Father McDonnell submits that the contract was formed by his acceptance of the call, which

acceptance was based on a provision in a manual. He urges that his termination before the expiration of three years was not in conformity with the manual's provision for involuntary termination. He contends that, in the words of the manual, his circumstances could not be described as "a pastoral situation . . . which might necessitate a priest's removal from his cure."1

Thus Father McDonnell places before the civil court, and seeks to place before a jury, the question of whether the bishop, as head of the church in Georgia, was legally justified in removing him from this cure.

The trial court, and this court, have become embroiled in a

controversy over whether the words of the manual constitute a legally enforceable contract. Resolution is sought by the application of principles fashioned for nonecclesiastical employer-employee relationships and for the construction of contracts generally. To do this it is necessary to enter the fray even deeper by determining whether in the church's polity the manual's language conflicts with the provisions of the canons and, if so, whether the canons govern.

As shown by the foreword to the manual, it was written by the bishop and the diocesan administrator and is described as a collection of "diocesan directives" and as "policies." The administrator rather than the bishop

prepared the sections heretofore quoted. Canon 6 Section 2 provides that: "The Missions of the Diocese shall be under the supervision and control of the Bishop. He shall appoint all Mission clergy and may, at his discretion, suspend or remove them." The bishop is elected by the church's Convention, which according to the church's constitution, is to be convened annually. He is the ordinary of the diocese (Canon O) and serves as president of the Council, which is directed to "carry out the policies, programs and directives of Convention; . . . ." (Canon 15 Section 1).

The case of Serbian Orthodox Diocese v. Milivojevich, supra, involved the church's removal of the bishop, as well as his

ultimate defrocking, and the reorganization of the diocese into three dioceses. The Supreme Court held that the Illinois state courts contravened the First and Fourteenth Amendments by engaging in improper inquiries into ecclesiastical matters, a prohibited zone even though some property questions were involved. That decision, and those upon which it is built, constitute the firm foundation upon which the unavoidable conclusion must be reached in this case, which is that it involves a religious dispute the resolution of which does not belong in the civil tribunal.

For the court to decide whether a binding civil contract was intended; for the court to construe the meaning of that contract if

there is one, or leave to a jury its construction if ambiguity raises questions of fact; for the court or jury to determine whether canons or manual directives control; and most clearly, for a jury to decide whether "a pastoral situation" occurred which warranted removal of the missions spiritual leader; all of these incursions into religious controversy constitute a large leap beyond the constitutional boundary. Inextricably entangled is whether the priest's performance of his duties as a priest met the requirements of his church as measured by ecclesiastical concerns.

The Supreme Court in Serbian Orthodox Diocese crystallized the constitutional mandate "that civil courts are bound

to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." 426 U. S. 713. What is involved here falls within that territory, which must remain foreign to civil tribunals.

The application of the Supreme Court's established principles by the lower federal court in Crowder v. Southern Baptist Convention, supra, and by this court in Monahan v. Sims, supra, show the way which must be trod by this court in reversing the trial court in this case. As quoted by this court in Monahan from Kedroff v. St. Nicholas Cathedral, 344 U. S. 94,

116 (73 SC 143, 97 LE 120) (1952): "Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." As demonstrated by Serbian Orthodox Diocese, the removal of the clergy is also an ecclesiastical matter even when property is involved.

The trial court was correct in granting summary judgment to the defendant church and denying summary judgment to the plaintiff priest, but for the reason that it did not have jurisdiction. A judgment right for any reason is to be affirmed. Okin Exterminating Co. v. Walker, 251 Ga. 536, 539 (307 SE2d 914)

(1983).

Judgment affirmed. Carley, C. J., McMurray, P. J., and Birdsong and Beham, JJ., concur. Deen, P. J., Banke, P. J., and Sognier and Pope, JJ., dissent.

ENDNOTE

1. "Spiritual charge; care of souls; the office of a parish priest or of a curate; hence, that which is committed to the charge of a parish priest or of a curate; a curacy." Webster's New Int'l Dictionary, 2nd Ed., Unabridged.

77181. McDONNELL v. EPISCOPAL DIOCESE OF GEORGIA. BA-156 to BEA

DEEN, Presiding Judge, dissenting.

I concur fully with the dissent of Presiding Judge Banke. However, the points made by the majority opinion provoke additional comments.

1. The United States Supreme Court has devised a tripartite test in considering establishment clause questions.

Under Lemon v. Kurtzman, 403 U. S. 602 (91 SC 2105, 29 LE2d 745) (1971), (a) any governmental action affecting religion must have a secular purpose; (b) the principal or primary effect of that governmental action must be one that neither advances one religion nor inhibits another religion; and (c) the governmental action must not constitute an excessive entanglement of government with religion. A minimal intrusion by the government into the affairs of religion, if it passes all three prongs of the Lemon test, is constitutionally permissible.

In the instant case, the trial court's and this appellate court's consideration and enforcement of the employment

relationship between the appellant and the appellee had a purely secular purpose of resolving an employment contract dispute that just so happened to involve a church and a minister. In no way can it be said that enforcement of the employment contract here either advances or inhibits religion. Likewise, resolution of contract disputes of this nature hardly constitutes an excessive entanglement of government and religion. It is important to note that no religious dogma, doctrine, creed, tenet, or theological issue is involved in resolving this contract law dispute. See Jones v. Wolf, 443 U. S. 595 (99 SC 3020, 61 LE2d 775) (1979).

2. In cases of this

nature, it should also be remembered that the establishment clause discussed above calls for the separation of state and religion, not church and state; separation of church and state is misnamed, misunderstood, and mistaken nomenclature. The establishment clause's prohibition and restriction actually is addressed to the state, and concerns forbidding the government's favoring or inhibiting or singling out any one religion for special treatment over another; the original idea was that the government should be substantially neutral as to religion. The restriction and prohibition is against state action, not any religious action. "[T]he Constitution affirmatively mandates

accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Lynch v. Donnelly, 465 U. S. 668, 673 (104 SC 1355, 79 LE2d 604) (1984). The concept of religion has expanded from its original theistic definition to its present theistic and sometimes nontheistic definitions, particularly as far as the free exercise clause is concerned. See Roberts v. Ravenwood Church of Wicca, 249 Ga. 348 (292 SE2d 657) (1982). Historically, up until recent years, in matters involving the establishment and free exercise clauses, a uniform definition of religion was used ("In God We Trust"; "Creator Endowed Rights"; a notion of theism). Today a narrower definition of religion is

employed in establishment clause considerations, as compared to use of a broad definition when the free exercise is invoked. When the latter clause is used, nontheism is also considered a religion. Torcaso v. Watkins, 367 U. S. 488 (81 SC 1680, 6 LE2d 982) (1961). With the expansion of the definition of religion, the sphere of possible governmental intrusion likewise is bound to increase. It thus becomes imperative and increasingly important to remember that the determinative emphasis is whether the governmental action is substantially neutral while being accommodating, rather than becoming hostile, to religion. In this case, the bottom line is that the courts are concerned merely with a secular

employment contract dispute, which is neither plus nor minus to any religion, and certainly no excessive entanglement of government and religion.

3. In Lyons v. Planter's Loan & Savings Bank, 86 Ga 485 (12 SE 882) (1890), one issue was whether church property could be applied to satisfy a debt a church owed its former pastor for services as a clergyman. Chief Justice Bleckley was at his most eloquent in analyzing the case:

"Here then is a debtor having some property, perhaps sufficient property, to discharge the debt. Why should it not be so applied? If any debt ought to be paid, it is one contracted for the health of souls -- for pious

ministrations and holy services. If any class of debtors ought to pay as matter of moral as well as legal duty, the good people of a christian church are that class. No church can have any higher obligation resting upon it than that of being just. The study of justice for more than forty years has impressed me with the supreme importance of this grand and noble virtue. Some of the virtues are in the nature of moral luxuries, but this is an absolute necessary of social life. If is the hog and hominy, the bacon and beans of morality, public and private. It is the exact virtue, being mathematical in its nature. Mercy, pity, charity, generosity, magnanimity, etc., are the liberal virtues. They flourish partly on

voluntary concessions made by the exact virtue, but they have no right to extort from it any unwilling concession. They can only supplicate or persuade . . . On the credit side of justice we can make any sacrifice of it that we will, but on the debit side we can make none whatever. I may burn as an offering my own bull or lamb, but not that which rightfully belongs to another owner. There is nothing more exalted than a strict duty and its performance. What we freely give cannot be better bestowed than what we pay in discharge of a perfect obligation. The law grants exemptions of property to families, but none to private corporations or collective bodies, lay or ecclesiastical. These must pay

their debts if they can. All their property legal and equitable is subject. Atlanta v. Grant, 57 Ga. 346. We think a court may well constrain this church to do justice. In contemplation of law, justice is not only one of the cardinal virtues, it is the pontifical virtue." Id. at 490-491. (Emphasis supplied.) Bleckley received nationwide recognition for the latter expression of acknowledging and confirming justice as the pontifical virtue.

A similar analysis is appropriate in the instant case to reach the conclusion that the church can be constrained to do justice in this simple and secular employment contract dispute. The majority opinion fails to meet the

requirement of accommodating religion even though we deal here only with a secular purpose. Not even a minimum of entanglement with religion, much less an excessive entanglement, is here involved. This results in hostility and discrimination toward religion inasmuch as our courts usually monitor all employment contracts of others, but here the majority turns its back on aiding resolution of contracts of religious groups. With this unfair, hostile, and discriminatory treatment by government toward religion I cannot agree.

I am authorized to state that Presiding Judge Banke joins in this dissent.

77181. McDONNELL v. EPISCOPAL DIOCESE OF GEORGIA. BA-156 to BEA.

BANKE, Presiding Judge, dissenting.

This case does not involve a dispute over ecclesiastical doctrine or church leadership but merely a dispute over whether the parties contracted for a definite term of employment and whether, if so, the appellee breached that contract by discharging the appellant without cause prior to the end of the term. No one is arguing that the bishop did not have the power to relieve the appellant of his pastoral duties. The question

is simply whether the appellant was entitled to continue to receive his salary, a fact which undoubtedly explains why the appellee never raised the First Amendment issue until questioned by this court during oral argument of the case.

"[T]he [United States Supreme] Court has . . . rejected an absolute rule that civil courts are powerless to resolve any church property dispute. Bouldin v. Alexander, 82 U. S. (15 Wall.) 131 (21 LEd 69) (1872); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U. S. 440 (89 SC 601, 21 LE2d 658) (1969); Jones v. Wolf, 443 U. S. 595 (99 SC 3020, 61 LE2d 775) (1979). Thus, Supreme Court decisions have attempted to strike an appropriate

balance between the establishment and free exercise concerns implicated when a court is asked to resolve an ecclesiastical dispute, and the interests of the state and the aggrieved party in resolution of the controversy by a court of law." Crowder v. Sou. Baptist Convention, 828 F2d 718 721 (11th Cir. 1987).

The decision of the majority in the present case does not attempt to strike such a balance but appears to create an absolute prohibition against the adjudication of any employment dispute between a cleric and his or her church, regardless of whether it is based on the alleged breach of a contractual obligation. I am greatly troubled by the very broad implications of this decision. Will it follow, for

example, that a church may defeat an action for back pay for services rendered by a priest merely by asserting that its doctrine prohibits it from acknowledging such debts? As I believe that the present controversy involves property rights only and does not call for a resolution of any ecclesiastical or theological dispute, I would hold that the trial court does have jurisdiction to entertain the action. Accord Gervin v. Reddick, 246 Ga. 56 (2) (268 SE2d 657) (1980); Hickman v. Booker, 231 Ga. 129 (1) (200 SE2d 279) (1973). Compare Monahan v. Sims, 163 Ga. App. 354 (294 SE2d 548) (1982); Serbian Orthodox Diocese v. Milivojevich, 426 U. S. 696 (49 LE2d 151, 96 SC 2372) (1976).

2. By the language of the manual of directives furnished to the appellant at the inception of his employment, the diocese clearly manifested its belief that the appellant was contractually bound to a minimum three-year term of employment. Compare Swanson v. Lockheed Aircraft Corp., 181 Ga. App. 876 (2) (354 SE2d 204) (1987); Burgess v. Decatur Fed. Svgs. & Loan Assn., 178 Ga. App. 787 (345 SE2d 45) (1986); Miles v. Bibb Co., 177 Ga. App. 364 (339 SE2d 316) (1985). I would accordingly hold that the trial court erred in denying the appellant's motion for partial summary judgment on the issue of whether such a contract existed; and I would reverse the grant of summary judgment to the appellee, leaving

for adjudication in the trial court the issue of whether a breach of contract occurred or whether the appellant's employment was properly terminated for cause.

I am authorized to say that Presiding Judge Deen, Judge Sognier, and Judge Pope join in this dissent.

EXHIBIT B

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

77181. RICHARD McDONNELL v. EPISCOPAL DIOCESE OF GEORGIA

Upon consideration of the motion for rehearing filed on behalf of appellant in the above styled case, it is hereby ordered that new page 8 attached hereto be substituted for old page 8 of the original opinion dated March 17, 1989. It is further ordered that Presiding Judge Deen's dissenting opinion to the majority opinion attached hereto be substituted for Judge Deen's dissenting opinion to

the majority opinion dated March 17, 1989. Motion for rehearing is hereby denied.

914) (1983).

Judgment affirmed. Carley, C. J., and Bird[illegible]song and Benham, JJ., concur. McMurray, P. J., concurs in the judgment only. Deen, P. J., Banke, P. J., and Sognier and Pope, JJ., dissent.

ENDNOTE

1. "Spiritual charge; care of souls; the office of a parish priest or of a curate; hence, that which is committed to the charge of a parish priest or of a curate; a curacy." Webster's New Int'l Dictionary, 2nd Ed., Unabridged.

77181. McDONNELL v. EPISCOPAL

DEEN, Presiding Judge, dissenting.

I concur fully with the dissent of Presiding Judge Banke. However, the points made by the majority opinion provoke additional comments.

1. The United States Supreme Court has devised a tripartite test in considering establishment clause questions. Under Lemon v. Kurtzman, 403 U. S. 602 (91 SC 2105, 29 LE2d 745) (1971), (a) any governmental action affecting religion must have a secular purpose; (b) the principal or primary effect of that governmental action must be one that neither advances one religion

nor inhibits another religion; and (c) the governmental action must not constitute an excessive entanglement of government with religion. A minimal intrusion by the government into the affairs of religion, if it passes all three prongs of the Lemon test, is constitutionally permissible.

In the instant case, the trial court's and this appellate court's consideration and enforcement of the employment relationship between the appellant and the appellee had a purely secular purpose of resolving an employment contract dispute that just so happened to involve a church and a minister. In no way can it be said that enforcement of the employment contract here either

advances or inhibits religion. Likewise, resolution of contract disputes of this nature hardly constitutes an excessive entanglement of government and religion. It is important to note that no religious dogma, doctrine, creed, tenet, or theological issue is involved in resolving this contract law dispute. See Jones v. Wolf, 443 U. S. 595 (99 SC 3020, 61 LE2d 775) (1979).

2. In cases of this nature, it should also be remembered that the establishment clause discussed above calls for the separation of state and religion, not church and state; separation of church and state is misnamed, misunderstood, and mistaken nomenclature. The establishment

clause's prohibition and restriction actually is addressed to the state, and concerns forbidding the government's favoring or inhibiting or singling out any one religion for special treatment over another; the original idea was that the government should be substantially neutral as to religion. The restriction and prohibition is against state action, not any religious action. "[T]he Constitution affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Lynch v. Donnelly, 465 U. S. 668, 673 (104 SC 1355, 79 LE2d 604) (1984). The concept of religion has expanded from its original theistic definition to its present theistic

and sometimes nontheistic definitions, particularly as far as the free exercise clause is concerned. See Roberts v. Ravenwood Church of Wicca, 249 Ga. 348 (292 SE2d 657) (1982). Historically, up until recent years, in matters involving the establishment and free exercise clauses, a uniform definition of religion was used ("In God We Trust"; "Creator Endowed Rights"; a notion of theism). Today a narrower definition of religion is employed in establishment clause considerations, as compared to use of a broad definition when the free exercise clause is invoked. When the latter clause is used, nontheism is also considered a religion. Torcaso v. Watkins, 367 U. S. 488 (81 SC 1680, 6 LE2d 982) (1961).

With the expansion of the definition of religion, the sphere of possible governmental intrusion likewise is bound to increase. It thus becomes imperative and increasingly important to remember that the determinative emphasis is whether the governmental action is substantially neutral while being accommodating, rather than becoming hostile, to religion. In this case, the bottom line is that the courts are concerned merely with a secular employment contract dispute, which is neither plus nor minus to any religion, and certainly no excessive entanglement of government and religion.

Several examples of cases (a) denoting <u>permissible</u> intervention and intrusion and (b)

impermissible intervention and intrusion, with religious implications and into religious controversies, are set forth below, so that a difference and distinction may be clearly seen:

A. (1) Reynolds v. United States, 98 U. S. 145 (25 LE 244) (1878). (Government permission to intrude, in criminal convictions of polygamy over religions claim that more than one spouse was a religious practice, was approved. Religious beliefs may not be regulated by government, but religious actions may be reviewed.) (2) Waltz v. Tax Commission, 397 U. S. 664 (90 SC 1409, 25 LE2d 697) (1970). (Government's intervention in approving tax exemptions for religious property was a

permissible, and did not constitute an excessive, entanglement with religion.) (3) McGowen v. Maryland 366 U. S. 420 (81 SC 1101, 6 LE2d 393) (1961). (Sunday legislative government closing laws did have a secular purpose as a uniform day of rest. While it was consistent with religious practice, it was a minimal permissible intrusion into religion.) (4) Marsh v. Chambers, 463 U. S. 783 (103 SC 3330, 77 LE2d 1019) (1983). (A state legislature had paid a chaplain who began sessions with a prayer. This minimal intrusion into religion was permissible under the sometimes-used historical test, rather than the most-time use tripartite test -- the same as "In God We Trust" -- used on government coins.)

B. (1) Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U. S. 696 (96 SC 2372, 49 LE2d 151) (1976). (Here, the government or court was prohibited from intruding into who controlled the "Diocese's Assets," and reorganization of the diocese into three dioceses. Decisions regarding church doctrine, tenets and assets was an impermissible intervention.) (2) Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U. S. 440 (89 SC 601, 21 LE2d 658) (1969). (Governmental or court determination of ecclesiastical questions are impermissible intrusions.) (3) NLRB v. Catholic Bishop, 440 U. S. 490 (99 SC 1313, 59 LE2d 533) (1979). (Use of compulsory bargaining under the

National Labor Relations Act to parochial schools poses as a hostility or threat to religion and is impermissible entanglement.) (4) Stone v. Graham, 449 U. S. 39 (101 SC 192, 66 LE2d 199) (1980). (Posting the "Ten Commandments" on schoolroom walls had an impermissible religious, rather than a secular, purpose.) (5) Engel v. Vitale, 370 U. S. 421 (82 SC 1261, 8 LE2d 601) (1962). (A prayer worded by the Board of Education and required to be recited daily had a religious, rather than a secular, purpose and would be an impermissible entanglement between government and religion.)

It is clear the facts of the instant case fit like a glove the former examples under (a) rather

than (b).

3. In Lyons v. Planter's Loan & Savings Bank, 86 Ga. 485 (12 SE 882) (1890), one issue was whether church property could be applied to satisfy a debt a church owed its former pastor for services as a clergyman. Chief Justice Bleckley was at his most eloquent in analyzing the case:

"Here then is a debtor having some property, perhaps sufficient property, to discharge the debt. Why should it not be so applied? If any debt ought to be paid, it is one contracted for the health of souls -- for pious ministrations and holy services. If any class of debtors ought to pay as matter of moral as well as legal duty, the good people of a christian

church are that class. No church can have any higher obligation resting upon it than that of being just. The study of justice for more than forty years has impressed me with the supreme importance of this grand and noble virtue. Some of the virtues are in the nature of moral luxuries, but this is an absolute necessary of social life. It is the hog and hominy, the bacon and beans of morality, public and private. It is the exact virtue, being mathematical in its nature. Mercy, pity, charity, generosity, magnanimity, etc., are the liberal virtues. They flourish partly on voluntary concessions made by the exact virtue, but they have no right to extort from it any unwilling concession. They can only

supplicate or persuade . . . on the credit side of justice we can make any sacrifice of it that we will, but on the debit side we can make none whatever. I may burn as an offering my own bull or lamb, but not that which rightfully belongs to another owner. There is nothing more exalted than a strict duty and its performance. What we freely give cannot be better bestowed than what we pay in discharge of a perfect obligation. The law grants exemptions of property to families, but none to private corporations or collective bodies, lay or ecclesiastical. These must pay their debts if they can. All their property legal and equitable is subject. Atlanta v. Grant, 57 Ga. 346. We think a court may well

constrain this church to do justice. In contemplation of law, justice is not only one of the cardinal virtues, it is the pontifical virtue." Id. at 490-491. (Emphasis supplied.) Bleckley received nationwide recognition for the latter expression of acknowledging and confirming justice as the pontifical virtue.

A similar analysis is appropriate in the instant case to reach the conclusion that the church can be constrained to do justice in this simple and secular employment contract dispute. The majority opinion fails to meet the requirement of accommodating religion even though we deal here only with a secular purpose. Not even a minimum of entanglement with

religion, much less an excessive entanglement, is here involved. This results in hostility and discrimination toward religion inasmuch as our courts usually monitor all employment contracts of others, but here the majority turns its back on aiding resolution of contracts of religious groups. With this unfair, hostile, an discriminatory treatment by government toward religion I cannot agree.

I am authorized to state that Presiding Judge Banke joins in this dissent.

IN THE SUPERIOR COURT, EASTERN JUDICIAL CIRCUIT OF GEORGIA

FATHER RICHARD MCDONNELL, Plaintiff,
vs.
EPISCOPAL DIOCESE OF GEORGIA, Defendant.

CIVIL ACTION NO. X87-1853-C

ORDER ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT

In April of 1984, Plaintiff, a priest in the Episcopal Church, was appointed pastor of two mission churches belonging to the Diocese of Georgia Defendant herein. At that time, he was given a manual of Diocesan Policies and Practices which included the following item:

> When a clergyman accepts the Diocesan's call to fill a mission cure in the Diocese, such acceptance constitutes an implied agreement that his tenure will be for a minimum of three years. Resignation prior

> to three years, unless such termination is by mutual agreement by the Bishop and the clergyman, constitutes a breach of contract. [Emphasis in original].

By November of 1985, Plaintiff had been removed from both positions. Plaintiff filed the above-styled lawsuit against Defendant, contending that a three-year employment contract existed, stated in the manual, and that Defendant had breached this contract.

Pursuant to OCGA &9-11-56, Defendant moves for summary judgment on the bais that the manual did not create an employment contract between the parties. Defendant further argues that even if the manual did create a contract, Plaintiff was not guaranteed a three-year employment period.

Plaintiff in reply moves for summary judgment on the grounds that the manual created a three-year employment contract, in part by pre-empting Plaintiff's right to terminate his employment "at will."

Generally employment manuals are not considered employment contracts. Burgess v. Decatur Fed. Sav. & Loan, 178 Ga. App 787 (1986). In the absence of a controlling contract, employment is for an indefinite period terminable at the will of either party. Nelson v. M & M Prods. Co., 168 Ga. App. 280 (1983). But even if a manual is to be considered a contract, it is considered to be an "at-will" employment contract for both parties where no specific period of employment is set forth.

Georgia Ports Auth. v. Rogers, 173 Ga. App. 538 (1985). Therefore, the test for the manual in the present case is first whether it is a contract or not, then second, whether it is a definite-period employment contract or merely an "at will" contract.

Construction of a contract is a question of law for the trial court, but when any matter of fact is involved, the jury should find the fact. OCGA &13-2-1. Overall, the manual in question does nothing more than "[set] forth certain policies and information concerning employment with [Defendant]." Rogers, supra. This, in and of itself, is insufficient to make the manual into an employment contract. But the words noted in Paragraph 1

above possibly raise an issue of fact as to whether the manual was evidence of an employment contract. Not only that, but also as to the kind of contract it may have been: one for employment for a definite period of time, i.e., not an "at will" contract.

Although the manual itself has ambiguities that seem in Plaintiff's favor, the import of the manual's provisions must be examined in relation to the official constitution and canons of the Church. The canons are the actual "statutes" of the Diocese. CF. Article I of the Church's constitution. Title II of the canons deals with organization and administration of the parishes and missions and therefore would be

applicable to the instant case. The canon that is directly applicable is Title II, Canon 6, concerning Diocesan missions, to which Plaintiff had been previously assigned. Under Section 5 of that canon, it is declared that the canons are the authority for the operation and administration of Diocesan missions.

Section 2 of that canon confers upon the Bishop the power to appoint all mission clergy and to remove them <u>at his discretion</u>. This section, by virtue of Title V, Canon 1, may be amended <u>only by vote of the ruling convention</u>. Therefore, notwithstanding the Bishop's foreword, where he states that the manual supplements policies formally established by Diocesan canon, any

language of the manual purporting to deviate from the Bishop's power to remove clergy "at will" must give way to the authority of the canons. In other words, the manual did not amend Section 2 of Title II, Canon 6.

Therefore, although ambiguities exist within the manual itself, the church's canons effectively override those ambiguities. If any contract was created between Plaintiff and Defendant, such a contract was subject to the canon that gives the Bishop power to remove clergy at his discretion.

Indeed, the Bishop stated in the manual's foreword that "[t]he Clergy ... are expected to be familiar with the Canons...." If

the manual were to be considered an employment contract for Plaintiff, that very contract referred itself to a controlling set of regulations, one of which - Title II, Canon 6 - specifically stated the only kind of employment contract Plaintiff could expect from Defendant, regardless of the sworn statement of what his intention was when he accepted employment with Defendant.

Plaintiff has not shown that an issue of fact exists that would prevent summary judgment against him. Defendant is entitled to judgment as a matter of law. For this reason, therefore, Plaintiff's Motion for Summary Judgment must obviously be denied. Accordingly, Defendant's Motion for Summary Judgment is granted and Plaintiff's

Motion for Summary Judgment is denied.

This 13th day of April, 1988.

Frank S. Cheatham, Jr., Chief Judge Superior Court, E.J.C., Georgia